(2)

No. 00-246

IN THE

Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit in this case following *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978) under the prior panel precedent rule because it is the earliest decision in the Eleventh Circuit on the issue of whether punitive damages may be aggregated in a class action to satisfy the amount-in-controversy requirement for diversity jurisdiction, is in conflict with *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995).

Whether the Eleventh Circuit interpreted the "matter in controversy" language of Title 28, U.S.C. Section 1332 exclusively from a single plaintiff's perspective, whether Petitioner has standing to raise this issue and whether, if both of the foregoing are answered in the affirmative, such an interpretation violates some defendant(s)' constitutionally protected equal protection guarantees.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Office Depot, Inc., has no parent corporation and, other than Massachusetts Financial Services Company, no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

On November 12, 1997, Petitioner, Cheryl Cohen ("Petitioner" or "Cohen"), filed a class action complaint against Office Depot. R1-1.[1] Cohen claims that she purchased $28.98 worth of office supplies (a printer cartridge and file folder labels) from Office Depot's Fall 1997 catalog. R1-5:¶¶ 15-16. Thereafter, she allegedly visited a nearby Office Depot store and discovered that she could have purchased the cartridge for $2.00 less than she paid through the catalog and the file folder labels for 30¢ less. *Id.*

Office Depot, in addition to its hundreds of retail stores located in 39 states, sells its merchandise through mail-order catalogs. In order to beat its competitors' prices, Office Depot offers a "155% Low Price Guarantee" which allows customers, should they find an identical item advertised for less, to receive the lower price plus 55% of the difference toward the purchase at Office Depot. R1-1-3:¶19. Cohen does not allege that she asked Office Depot to honor this guarantee and was refused. Instead, she filed suit claiming that she was entitled to the "155% Low Price Guarantee" contained in Office Depot's catalog. She sought the difference between what she paid for the cartridge and file folder labels through the catalog and what she would have paid for those items at the Office Depot store — $2.30 — plus 55% of the difference — $1.27. R1-1-10 to 15: ¶¶ 38, 47, 52, 57, 60, 64. Her compensatory damage claim was $3.57.

Petitioner's class action complaint in federal court alleged the following causes of action: unfair and deceptive

1. Record references are to the record before the Court of Appeals for the Eleventh Circuit.

trade practices, injunctive relief, fraud, misleading advertising, unjust enrichment and negligent advertising. R1-1. Cohen claimed that the statements contained in Office Depot's mail order catalogs regarding its prices were misleading and designed to cause customers to believe that the catalog prices were as low as or lower than the prices charged by Office Depot's competitors or the prices charged by the hundreds of Office Depot stores dispersed throughout the United States. R1-2-3:¶¶ 6, 8-11. Cohen admitted in her complaint, however, that the same catalogs upon which she premised her claim also explained, under the boldfaced heading, "**About Our Prices**" that "[p]rices at individual Office Depot stores may be slightly different," that prices in the catalog "may not be indicative of the actual selling prices in [the customer's] area," and that actual savings would vary. R1-1-4:¶9(d) & attachment. She requested compensatory damages, statutory attorneys' fees, injunctive relief and punitive damages.

Cohen premised federal jurisdiction on diversity, pursuant to Title 28, U.S.C. Section 1332(a). She alleged that she was a citizen of the State of Georgia, R1-1-2:¶2, and that Office Depot was a citizen of the State of Florida. R1-1-2:¶3. She recognized, however, that her $3.57 compensatory damage claim fell far short of the $75,000 minimum amount-in-controversy required under Section 1332. She asserted that, "although Plaintiff's compensatory damages may be relatively low, Plaintiff seeks, on behalf of herself and the Plaintiff class, aggregate punitive damages of at least $10,000,000 and attorneys' fees in which Plaintiff will have an undivided interest." R1-1-2:¶4. She sought that amount on behalf of all of the 39,000 class members. R1-1-7:¶22.

Office Depot filed a series of motions demonstrating that the true amount in controversy in this action fell far short of the statutory $75,000 minimum for diversity actions. Office Depot moved to dismiss the complaint for failure to state a claim, R1-20, to strike plaintiffs' claims for punitive damages[2], R1-16, to strike various unauthorized claims for attorneys' fees, R1-17, and to dismiss for lack of subject matter jurisdiction. R1-18.

In the motion to strike punitive damages, Office Depot noted that Florida law prohibits a plaintiff from asserting a claim for punitive damages prior to court approval, and that Cohen had failed to comply with the statute. R1-17-3, 5 (citing § 768.72, Fla. Stat.). Office Depot argued that Section 768.72 applies in federal court to state-law claims for punitive damages. R1-17-4. Accordingly, in the motion to dismiss for lack of subject matter jurisdiction, Office Depot noted that Cohen could not rely on the punitive damage claim to meet the required $75,000 amount-in-controversy. R1-18.

The district court dismissed the complaint for lack of subject matter jurisdiction, noting that Cohen's compensatory claim amounted to less than $4.00. R2-54-3. The district court then held that Cohen's claim for punitive damages was

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2. Petitioner asserts that punitive damages are warranted because Office Depot admitted that its claim of free delivery was false. Petition at 3-4, n.4. Office Depot has made no such admission. Petitioner refers to a comment made by an Office Depot public relations person who was asked about a state court action, virtually identical to this federal case, that had just been filed. R3-4 and Exhibit C to Attached Cohen Affidavit. Any such statements by Office Depot's public relations personnel do not constitute corporate admissions.

unauthorized under Section 768.72 and thus was stricken. R2-54-5. Without a punitive damage claim, and because her claims for injunctive relief and attorneys' fees did not satisfy jurisdictional requirements, the district court determined that she had failed to establish the minimum amount-in-controversy as required by Title 28, U.S.C. Section 1332.

The Eleventh Circuit, in its first opinion, *Cohen v. Office Depot, Inc.*, 184 F.3d 1292 (11th Cir. 1999) ("*Cohen I*") determined that Section 768.72 conflicted with Fed. R. Civ. P. 8(a)(3) and that she did not need leave of court before pleading a request for punitive damages. Additionally, *Cohen I* determined that punitive damages could be aggregated in this case to satisfy the amount-in-controversy requirement for diversity jurisdiction. In reaching this conclusion, *Cohen I* relied upon *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), a case applying Alabama law.

In its Petition For Panel Rehearing and Petition For Rehearing En Banc, Office Depot pointed out that the panel erred in relying upon *Tapscott*, which held that the amount-in-controversy requirement for diversity jurisdiction could be met by aggregating a class claim for punitive damages under Alabama law. However, prior to the *Tapscott* decision, the Eleventh Circuit had reached the opposite conclusion in the decision of *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978).[3] As Office Depot argued, because *Lindsey* and *Tapscott* decided the same issue under Alabama law,

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3. In 1981, the Court of Appeals for the Fifth Circuit "split" and the Eleventh Circuit was created. As a result, Fifth Circuit cases decided prior to 1981 are binding precedent on the current Fifth Circuit, as well as the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

the panel was required to follow the earlier *Lindsey* decision under the prior panel precedent rule. *See United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994) ("when there is no method of reconciling an intracircuit conflict of authority, 'the earliest panel opinion resolving the issue in question binds the circuit until the court resolves the issue en banc.' ")

The Eleventh Circuit granted rehearing and issued its second opinion in *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) ("Cohen II"). The Eleventh Circuit analyzed its prior decisions in *Lindsey* and *Tapscott* and determined that there was no difference between the two cases in so far as the "common and undivided interest" analysis was concerned. *Id.* at 1075. Applying the prior panel precedent rule, the Eleventh Circuit found that *Lindsey* was controlling and rescinded that part of its opinion in *Cohen I* that relied upon *Tapscott* to hold that the $10 million punitive damage claim on behalf of Cohen's proposed class satisfied the amount-in-controversy requirement for diversity jurisdiction. *Id.* at 1076-77. In *Cohen II*, the Eleventh Circuit specifically declined to analyze whether it thought *Lindsey*, or for that matter *Tapscott*, was correctly decided. *Id.* Instead, the Eleventh Circuit relied upon the prior panel precedent rule to reach its decision. After further analysis of other issues, *Cohen II* affirmed the district court's dismissal of the complaint for lack of subject matter jurisdiction.

Several additional points in response to Cohen's statement of the case are in order. As noted above, *Cohen II* did not address the substantive merits of either *Lindsey* or *Tapscott*. Rather, upon Office Depot's Motion for Rehearing filed after *Cohen I*, the Eleventh Circuit examined *Lindsey* to ensure that it was applicable to the facts presented in this case. After concluding that *Lindsey* should be applied, the

Eleventh Circuit correctly followed the prior panel precedent rule and held that *Lindsey*, as the earliest decision on point in the Circuit, mandated the result reached in *Cohen II*.

Petitioner also mischaracterizes the *Cohen II* decision when she states that it tacitly acknowledged a conflict with the Fifth Circuit by citing to *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). *Cohen II* does not, in any fashion, acknowledge a conflict with *Allen*. In fact, *Cohen II* indicates that *Allen* should be compared to the Fifth Circuit's later decision in *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998), in which the *Ard* court recognized that it was bound to follow *Lindsey*'s rule and that it was unclear how the decision in *Allen* was reached.

Finally, Petitioner acknowledges that she filed a Petition for Rehearing and Rehearing En Banc after *Cohen II*. The Petition for Rehearing En Banc, which was denied, raised the same arguments found in Cohen's Petition for Writ of Certiorari. Simply put, Petitioner seeks to revisit those issues here, which the Eleventh Circuit properly declined to address en banc, or otherwise.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Inappropriate To Resolve An Intracircuit Conflict

In an attempt to convince this Court that certiorari should be granted, Petitioner initially argues that there is an alleged conflict between the circuit courts of appeals on the issue of aggregation of punitive damages in the class action context to meet the amount-in-controversy requirement of Title 28,

U.S.C. Section 1332(a). In support of this contention, Petitioner erroneously asserts that (i) *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978) failed to consider this Court's holdings in *Snyder v. Harris*, 394 U.S. 332 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973); and (ii) *Cohen II*'s purported affirmance of *Lindsey* conflicts with the Fifth Circuit's decision in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1324, 1326 (5th Cir. 1995). As discussed in Sections B and C below, both propositions are wrong.

At the heart of these arguments, however, is Petitioner's real contention — that *Lindsey* conflicts with *Tapscott* and *Allen*. That argument is equally flawed.

Lindsey was decided by the Fifth Circuit on July 12, 1978, prior to the split of the circuit. As such, any conflict between a decision rendered by the Fifth Circuit prior to the split (*Lindsey*) and any decision rendered by the Fifth Circuit (*Allen*) or the Eleventh Circuit (*Tapscott*) after the split results in an intracircuit conflict. As this Court recognized in *Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 2298, 2302 (1974) an intracircuit conflict is generally not a sufficient basis for granting certiorari because, "decisions between different panels of the same court of appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the court of appeals itself." When faced with different decisions from different panels of a court of appeals, it is primarily the task of the court of appeals to reconcile its own internal difficulties. *Wisniewski v. United States of America*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957). Doubts about the respect to be accorded to a previous decision of a different panel should not be the occasion for

invoking so exceptional a jurisdiction as that of the United States Supreme Court. *Id.* In short, any alleged conflict between *Lindsey* and *Tapscott* or *Allen* is an intracircuit conflict and is not an appropriate basis to grant certiorari.

Furthermore, any purported conflict between *Lindsey* on the one hand, and *Tapscott* or *Allen* on the other, has been addressed. The law in the Eleventh Circuit is not in a state of flux or uncertainty. The decision by the Eleventh Circuit in *Cohen II* to correctly apply *Lindsey* under the prior panel precedent rule precludes the future application of *Tapscott*.[4]

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4. Indeed, *Tapscott* has been widely rejected. Two circuits, the current Fifth Circuit in *Ard*, 138 F.3d at 602, and the Second Circuit in *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430 (2d Cir. 1997) rejected *Tapscott*. Numerous district courts have also rejected *Tapscott*. *See, e.g.*, *Bishop v. GM Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Tapscott represents an unwarranted and ill-considered extension of the doctrine of 'common and undivided interest' to highly speculative punitive damages claims"); *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 346-47 (D.N.J. 1998) (following *Tapscott* "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate"); *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964, 972-73 (D. Minn. 1998) (rejecting *Tapscott*; "the reality that each class member could advance a separate punitive damages claim in a separate lawsuit, without affecting the punitive claims of other class members" distinguishes with a "bright line" such cases from those seeking an undivided interest in a *res*); *Green v. H & R Block*, 981 F. Supp. 951, 954 (D. Md. 1997) (rejecting *Tapscott*); *Graf v. Safeco Ins. Co. of Am.*, 977 F. Supp. 971, 972 (E.D. Mo. 1997) (same); *Karpowicz v. General Motors Corp.*, No. 97 C 1390, 1997 WL 156542, *2 (N.D. Ill. 1997) (same); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245 at 1250-51 (D. Ariz. 1996) (declining to follow *Tapscott*; class members only "brought their claims in a single suit for convenience

(Cont'd)

Likewise, the Fifth Circuit's subsequent discussion and analysis of *Allen* in *Ard v. Transcontinental Gas Pipe Line Corp.*, has confirmed the viability of *Lindsey* and the limitation of *Allen* in the Fifth Circuit. 138 F.3d at 601-02.

B. No Conflict Exists Between *Cohen II* and *Allen*

Petitioner's contention that *Cohen II* is in conflict with the Fifth Circuit's post-split decision in *Allen* is also erroneous. The first question presented in her petition is:

> Whether the decision of the Eleventh Circuit Court of Appeals in this case finding that punitive damages may not be aggregated in a **class action** to satisfy the amount in controversy required by 28 U.S.C. Section 1332, which is in conflict with the Fifth Circuit Court of Appeals' decision in *Allen v. R&H Oil & Gas Co.*, 53 F.3d 1326 (5th Cir. 1995), is in conformity with this Court's holdings in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973) regarding the nature of common and undivided interests for aggregating damages. (Emphasis added.)

(Cont'd)
and economy"); *see also Engel v. Chevron Corporation, Inc.*, 1996 WL 1687454 (E.D. Tenn. 1996) (declining to follow *Tapscott* and *Allen*; holding that punitive damages may not be aggregated to meet the amount-in-controversy requirement); *Monroe v. Cuna Mutual Insurance Society*, 1999 WL 1078702 (W.D. Tenn. 1999) (declining to follow *Tapscott* in accord with Tennessee law on punitive damages); *In re Cardizem CD Antitrust Litigation*, 90 F. Supp. 2d 819, 833 (E.D. Mich. 1999) (declining to follow *Tapscott* in aggregating claimed statutory damages).

The issue resolved in *Allen* was whether aggregation of punitive damages was permissible under Mississippi law, in a case involving multiple plaintiffs but which was **not a class action**. *Allen*, 63 F.3d at 1329. The Fifth Circuit specifically pointed out in the beginning of the decision that the case was not a class action when it stated, "[t]he Allen plaintiffs' individual claims — **the suit is not a class action** . . . ." *Id.*[5] There can be no conflict when the issues presented in *Cohen II* and *Allen* are not identical. Where an asserted conflict in decisions arises from differences of fact, and not in application of a principle of law, certiorari is inappropriate. *Wisconsin Electric Company v. The Dunmore Company*, 282 U.S. 813, 51 S. Ct. 214 (1931).

Furthermore, Petitioner's claim that *Allen* stands for the proposition that the Fifth Circuit allows the aggregation of punitive damages for the purposes of satisfying the amount-in-controversy requirement is incorrect. Approximately three years after the Fifth Circuit decided *Allen*, a different panel of the Fifth Circuit issued its decision in *Ard v. Transcontinental Gas Pipe Line Corporation*, 138 F.3d 596 (5th Cir. 1998). The *Ard* decision noted that *Allen* was based upon the peculiar nature of punitive damages under Mississippi law. *Id.* at 602. In fact, *Ard* specifically noted that *Allen* departed from *Lindsey*, the law of the circuit, "solely" because of this peculiar nature of Mississippi law. *Ard* continued stating that *Allen* "does not purport to establish

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5. Other courts facing the same issue of whether punitive damages may be aggregated in order to satisfy the amount-in-controversy have also expressly noted that the *Allen* court was not faced with a class action controversy. *See e.g.*, *Addison v. Illinois Central R. Co.*, 967 F. Supp. 173, 176 (E.D. La. 1997) (holding punitive damages could not be aggregated to satisfy the amount of controversy).

a precedent for aggregation of punitive damage claims asserted under federal law or the law of any other state." *Id.* As a result, *Ard* held that *Lindsey* is still the law of the Fifth Circuit and refused to allow a class plaintiffs' punitive damage claim to be aggregated for purposes of determining the jurisdictional amount. *Id.* at 602.

Petitioner claims that *Ard*, while reaching a different result, is consistent with *Allen* and correctly advised this Court that the *Ard* decision was based upon the law regarding punitive damages in the State of Louisiana. Petition at 14. While Petitioner correctly points out that the two cases were decided under the laws of different states, this emphasizes all the more that no conflict exists between *Lindsey* and *Allen*.[6] Furthermore, the court in *Cohen II* expressly noted that the nature of punitive damages is the same under Florida law as under Alabama law, which was applied in *Lindsey*. *Cohen II*, 204 F.3d at 1075 (citing *Cohen I*, 184 F.3d at 1295). Since the nature of the state law applied in *Lindsey* is the same as in *Cohen II*, and because the Fifth Circuit determined that the state law applied in *Allen* is peculiar, *Allen* does not conflict with *Cohen II* or *Lindsey*.

Lastly, it is important to remember that the Petition for Writ of Certiorari pertains to *Cohen II*, not *Lindsey*. Petitioner's argument that "*Lindsey* failed to consider this Court's holdings in *Snyder* and *Zahn*" is not only incorrect, but of no value to this Court's decision on whether to grant certiorari. The *Lindsey* decision constitutes the law of the circuit. *Cohen II* followed *Lindsey*, without separate substantive analysis, applying the prior panel precedent rule.

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6. The Eleventh Circuit agreed with this interpretation of *Ard* in *Cohen II*. *Cohen II*, 204 F.3d at 1075. (footnote 5).

The argument that *Cohen II* is flawed because of an alleged error in the 23 year old *Lindsey* decision is absurd.[7]

C. *Lindsey* Properly Followed *Snyder* and *Zahn*

While the analysis conducted in *Lindsey* bears no relation to this Court's decision on whether to grant certiorari, Petitioner's claim that *Lindsey* did not address the holdings or analysis of *Snyder* or *Zahn* that aggregation is permissible to meet the amount-in-controversy requirement where "two or more plaintiffs unite to enforce a single title or right in which they have a common or undivided interest" is wrong. The *Ard* court expressly stated that "*Lindsey* therefore applies *Snyder*'s reasoning that compensatory damages claims cannot be aggregated for jurisdictional purposes to the context of punitive damages claims." *Ard*, 138 F.3d at 601. Furthermore, the *Lindsey* decision cites directly to *Snyder* for the proposition that, "the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying this jurisdictional predicate. *See Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969);" *Lindsey*, 576 F.2d at 593. The court in *Lindsey* then included a quote, verbatim, from *Zahn*,

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7. After *Cohen II* was issued, Petitioner moved for Panel Rehearing and Rehearing (or Hearing) En Banc. This request was denied by the Eleventh Circuit on June 5, 2000. Should the Eleventh Circuit have determined that its analysis in *Lindsey* failed to properly examine *Snyder* or *Zahn*, it had the opportunity to consider this matter en banc. It appropriately determined no rehearing was necessary. It is the responsibility of a court of appeals, not the Supreme Court, to reconcile its internal difficulties. *Wisniewski v. United States of America*, 353 U.S. 901, 77 S. Ct. 663, 634 (1957).

> [m]oreover, as the Supreme Court held in *Zahn v. International Paper Co.*, 511 (1973): "The rule plainly mandates not only that there may be no aggregation (of claims) and that the entire case must be dismissed where none of the plaintiffs claim more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."

Lindsey, 576 F.2d at 593 (quoting *Zahn*, 414 U.S. 291, 94 S. Ct. 505 (citation omitted)). While perhaps the Petitioner did not like the parts of *Snyder* and/or *Zahn* properly cited by the court in *Lindsey*, it simply cannot be said that the *Lindsey* court did not address the holdings or analysis of *Snyder* or *Zahn*.

Finally, in analyzing *Lindsey* to determine whether it was required to follow *Lindsey* under the prior panel precedent rule, *Cohen II* concluded that *Lindsey* considered these aspects of *Snyder* and *Zahn* as well. *Cohen II*, 204 F.3d at 1073-75.

D. *Cohen II* Is Not In Conflict With *Free v. Abbott Laboratories*

Plaintiff also claims that the holding in *Lindsey*, and its alleged affirmance by *Cohen II*, is in conflict with the Fifth Circuit's decision in *Free v. Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995), *aff'd*, 120 S. Ct. 1578 (2000). In support of this argument, Petitioner claims that the grant of certiorari and this Court's per curiam affirmance of *Free*, clearly affects the viability of the *Lindsey* opinion to the extent that *Lindsey* cited to *Zahn* on the issue of

non-aggregation. Petition at 21. This Court's per curiam decision in *Free* was rendered by an evenly divided court merely ending the process of direct review, settling no issue of law, and carrying no precedential weight. *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 378 (1972) (declining to give any weight to Court's equally divided affirmance of lower court decision). Petitioner's blanket assertion without any authority to the contrary is clearly incorrect.

Furthermore, the issue in *Free* was whether in a class action brought under the antitrust laws of the State of Louisiana, the individual claims of the class representatives met the requisite jurisdictional amount and whether the court could exercise supplemental jurisdiction over the class members. *Free*, 51 F.3d at 527. The Fifth Circuit in *Free* held that Title 28, U.S.C. Section 1367, which grants district courts supplemental jurisdiction over related claims, overruled *Zahn* to the extent that a district court can exercise this supplemental jurisdiction even when other class members do not meet the amount-in-controversy requirements. *Id.* at 529. What the *Free* decision did not hold nor affect in any manner is whether punitive damages can qualify in determining whether the amount- in-controversy is met. In fact, the Fifth Circuit expressly noted that the *Free* decision has no bearing on the analysis regarding the aggregation of punitive damages for jurisdictional purposes in the *Ard* opinion. The court stated,

> although it is not important for our analysis, this Circuit has recognized that Zahn's holding that each plaintiff must independently satisfy the jurisdictional amount has been overruled due to congressional amendment of 28 U.S.C. 1367.

> *See In Re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). **Neither this holding nor the premise which underlies it affects our analysis in this case.**

Ard, 138 F.3d at 600 (emphasis added). Therefore, Petitioner's assertion that the holding in *Free* impacts the analysis in this case or that it provides a conflict upon which this Court should grant certiorari is misplaced.

E. *Cohen II* Is Not An Affirmance Of *Lindsey*

Petitioner incorrectly claims that *Cohen II* constitutes an affirmance of *Lindsey*. Petition at 20. *Cohen II* is not an affirmance of *Lindsey* or its analysis. Rather, the panel in *Cohen II* clearly stated that it reversed *Cohen I* as it dealt with the aggregation of punitive damages for jurisdictional purposes on the grounds that the earliest panel opinion resolving the issue in question binds the circuit until the court resolves the issue en banc. *Cohen II*, 204 F.3d at 1072. In fact, Petitioner does not dispute that *Cohen II* properly concluded that it was bound by the earliest circuit precedent on point.[8]

Cohen II did not review the substantive basis of the *Lindsey* decision. Rather, the court compared *Lindsey* and *Tapscott* in order to support its conclusion that the same issue was presented in both cases and concluded that *Cohen I*'s reliance on *Tapscott* could not stand. Specifically, the court noted, "[Cohen] contends that the 'common and undivided interest' issue was never presented to us in *Lindsey*, and thus,

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8. It is important to note that the "Questions Presented" section of the Petition does not include any reference to the prior panel precedent rule applied in *Cohen II*.

there is no real conflict between our *Lindsey* and *Tapscott* decisions." *Id.* at 1075. The Court continued,

> Cohen's contention misconstrues the operation of our prior panel precedent rule. The *issue* in *Tapscott* was the same as that in *Lindsey*: whether a class claim for punitive damages can be considered in the aggregate in order to establish diversity jurisdiction over all potential members of a class, or must instead be attributed *pro rata* to each class member.

Id. The *Cohen II* decision clearly did not address the substantive rationale upon which *Lindsey* was based. Rather, its determination to follow *Lindsey* was based upon the prior panel precedent rule. *Cohen II* is not an affirmance of *Lindsey*.

F. Equal Protection Guarantees Have Not Been Implicated

In a final attempt to interest this Court in certiorari, Petitioner argues that Title 28, U.S.C. § 1332(a), as applied in *Cohen II*, violates a defendant's equal protection rights. Specifically, Petitioner asserts that "the *Lindsey* and *Cohen II* opinions have determined that the phrase 'matter in controversy' must be interpreted exclusively from the perspective of a single plaintiff." Petition at 22. Such a perspective, Petitioner argues, "deprives a foreign **defendant** of the statutorily created right of access to a federal court when faced with very large monetary judgments," (Petition at 21 emphasis added), and "discriminates against out of state **defendants** by preventing access to a federal forum." Petition at 24 (emphasis added).

Petitioner has never raised an equal protection argument prior to this Petition for Writ of Certiorari.[9] The argument that she raises now is vague, undeveloped and fatally flawed for three reasons. First, Petitioner has no standing to assert the equal protection rights of defendants that she alleges have been violated by *Cohen II*'s application of Section 1332. She has no injury. She is not the defendant in this matter. Second, *Cohen II* did not apply different standards to plaintiffs and defendants. Third, even if *Cohen II* had decided to treat plaintiffs and defendants differently, a rational basis exists for such treatment. Each is discussed below.

First, in order to establish Article III standing, a party "must demonstrate 'injury in fact' — a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.' *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990)." *Vermont Agency of Natural Resources v. U.S.*, __ U.S. __, 120 S. Ct. 1858, 1861 (2000). Petitioner has asserted no concrete, actual or imminent harm to herself. The alleged injured parties are defendants in class actions who seek to meet the amount-in-controversy required for federal jurisdiction by aggregating claims for punitive damages. No such defendants are before the Court. The actual defendant in this case, Office Depot, has asserted no violation of any equal protection rights.

Any indirect injury to Petitioner resulting from the alleged denial of equal protection to defendants is also insufficient to confer standing on her.

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9. Several amici raised the equal protection issue in an Amicus Brief To The Eleventh Circuit Supporting Cohen's Petition For Rehearing En Banc.

> [E]ven when "the very same allegedly illegal act that affects the litigant also affects a third party," a plaintiff "cannot rest his claim to relief on the legal rights or interests of [the] third part[y]." *U.S. v Department of Labor v. Triplett*, 494 U.S. 715, 720 110 S. Ct. 1428, 1431, 108 L. Ed. 2d 701 (1990) (internal quotation marks omitted). A party raising a constitutional challenge to a statute must demonstrate not only "that the alleged unconstitutional feature [of the statute] injures him" but also that "he is within the class of persons with respect to whom the act is unconstitutional." *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S. Ct. 434, 435, 66 L. Ed. 852 (1922). This requirement arises from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question. . . .

Miller v. Albright, 523 U.S. 420, 446, 118 S. Ct. 1428, 1442 (1998) (O'Connor, J., concurring in the judgment, joined by Kennedy, J.). This case illustrates the need for such a rule. The purported rightholder here, Office Depot, does not have, much less want, to assert this constitutional claim.

Second, *Cohen II* did not adopt the position that only the plaintiff's perspective on punitive damages may be considered. *Cohen II* applied a uniform standard, equally applicable to plaintiffs and defendants. Petitioner does not refer to any language or analysis in *Cohen II* where the court purportedly made an alleged erroneous determination that the economic impact of the case on defendant must be disregarded. No such determination was made.

Petitioner is equally vague about how *Cohen II*'s application of 28 U.S.C § 1332 might violate a defendants' equal protection rights. A single defendant will always pay more than several class plaintiffs will collect. But, *Cohen II* does not rest on the amount that individual plaintiffs collect nor the amount that a defendant pays. It rests on the Court's previous decision in *Lindsey* which determined that punitive damages cannot be aggregated. For equal protection purposes, it does not matter whether the analysis is approached from the plaintiffs' or defendant's perspective. The same standard and the same analysis were used in determining whether a plaintiff or a defendant meets 28 U.S.C. §1332(a)'s amount-in-controversy requirement. Neither may aggregate punitive damages.

Third, if the Eleventh Circuit had applied Title 28, U.S.C. § 1332(a) in a way that discriminates against defendants, which it did not, that application would not violate defendants' equal protection rights.[10] Legislatures are afforded great deference and their decisions are valid unless they bear no rational relationship to a permissible government objective. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S. Ct. 1742, 1745 (1979). If *Cohen II*'s treatment of damages does discriminate between plaintiffs and defendant, it is rational to do so.

The common law is an adversarial system in which the plaintiff sets the stage for litigation. Plaintiffs have much more control over the forum in which a case will be heard than do defendants. Plaintiffs fashion the complaint. They allege the amount of damages and other relief sought.

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10. Because 28 U.S.C. § 1332(a) is a federal statute, the Fifth Amendment would be applicable.

They also determine whether or not they will proceed as a member of a class action or individually. Likewise Plaintiffs and defendants are treated differently in many respects. The most obvious of these is the different burdens of proof and presumptions that each bear. Petitioner points to no authority that challenges this differential treatment on equal protection grounds. Indeed, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434 (1977) does not address any equal protection issues. It was an action for an injunction brought by a Washington state group challenging a North Carolina statute. It viewed the damages from the perspective of some **individual plaintiff members** of that group. Those plaintiffs individually had damages in excess the federal jurisdiction amount.

In sum, if this Court were to determine that Section 1332(a), as applied by *Cohen II*, discriminates against defendants, such an application has as its rational basis the proper and efficient determination of whether jurisdiction exists in our adversarial system.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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